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Stephen Whitehead, Deborah Whitehead v. American Motors Sales Corporation, Jeep Corporation, Larry Anderson, Variable Annuity Life Insurance Company : Reply Brief

Utah Supreme Court

UTAH SUPREME COURT

BRIEF

IN THE SUPREME COURT OF THE STATE OF UTAH

DEBORAH WHITEHEAD and
STEPHEN WHITEHEAD,

Plaintiffs-Respondents,

v.

LARRY ANDERSON, VARIABLE
ANNUITY LIFE INSURANCE COMPANY,

Defendants, Case No. 19695

and

AMERICAN MOTORS SALES CORPORATION
and JEEP CORPORATION,

Defendants-Appellants.

REPLY BRIEF OF APPELLANTS
American Motors Sales Corporation and
Jeep Corporation

Appeal from the Fourth Judicial District Court
of Utah County, State of Utah
The Honorable J. Robert Bullock, District Judge, Presiding

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Appellants American Motors Sales Corporation and Jeep Corporation (hereinafter referred to as "AMC/Jeep"), respectfully submit this Reply Brief in answer to the new matters set forth in the brief of plaintiffs-respondents Deborah Whitehead and Stephen Whitehead.

INTRODUCTION

On this appeal, AMC/Jeep seeks reversal of the trial court's judgment on the grounds that the trial court made incorrect and prejudicial rulings on questions of law and with respect to the admissibility of certain evidence. Specifically, AMC/Jeep argued in its opening brief to this Court that the trial court erred (a) in permitting plaintiffs to introduce irrelevant and inflammatory evidence (App. Br. at 26-36); (b) in denying AMC/Jeep's fundamental right to cross-examine plaintiffs' witnesses (App. Br. at 36-42); (c) in refusing to permit AMC/Jeep to rebut such evidence by excluding substantial portions of AMC/Jeep's own evidence (App. Br. at 42-56); (d) in denying AMC/Jeep's motion for mistrial based on improper closing arguments by opposing counsel (App. Br. at 56-59); (e) in refusing to permit appellant Jeep Corporation to amend its answer to include a statute of limitations defense (App. Br. at 68-73); (f) in refusing to direct a verdict in favor of AMC/Jeep in light of their statute of limitations defense (App. Br. at 73-74); and (g) in excluding all evidence relating to the presence of and plaintiffs' failure to utilize available seat belts. (App. Br. at 59-68).

In their responsive brief, plaintiffs selectively address a few of the errors cited by AMC/Jeep but wholly ignore others. For example, AMC/Jeep assigns error to the admission by the trial court of three films showing Jeep

CJ5s, not Commandos, overturning under artificially induced conditions wholly dissimilar to the conditions of plaintiffs' accident (App. Br. at 27-31), and a chart purporting to show the so-called "roll-over threshold" of a Commando, but which was, in fact, based entirely upon information obtained by plaintiffs' expert in testing CJ5s. (App. Br. at 32). In their responsive brief, however, plaintiffs attempt to justify admission by the trial court of only one of the three films. No mention is made of the other two films or the chart erroneously received in evidence by the trial court. (Res. Br. at 19-27).

In defense of the trial court's limitation of AMC/Jeep's right to cross-examine plaintiffs' experts, the respondents' brief principally argues the volume of cross-examination permitted without directly addressing the prejudicial effect of the specific limitations raised in appellants' brief. Respondents further attempt to distract the Court's attention from the substantive errors below by deliberately mischaracterizing the tone and intent of appellants' brief as a personal attack on the integrity of the presiding trial judge. Such, of course, is not the case. The record merely reflects that the court below misunderstood the legal framework in which this case was presented, the elements of plaintiffs' cause of action, plaintiffs' burden of proof, AMC/Jeep's defensive theories, the relevance of defendants' evidentiary proffers and the complete irrelevance of the

majority of plaintiffs' expert testimony. (See App. Br. at 26-27).

Similarly, in their effort to defend the trial court's exclusion of substantially all of AMC/Jeep's demonstrative evidence, plaintiffs suggest that the exclusions constituted "sanctions" imposed by the trial court for alleged discovery abuse by AMC/Jeep. As the record clearly reflects, however, no motion for sanctions was ever made by plaintiffs and none of AMC/Jeep's evidence was excluded for that reason. In every instance, AMC/Jeep's evidence was excluded based upon the trial court's failure to comprehend its relevance. The judgment below must be reversed and the case remanded for a new trial.

ARGUMENT

POINT I

THE TRIAL COURT'S ERRORS ARE NOT SUPPORTED BY PRE-TRIAL RULINGS

Plaintiffs attempt to defend the trial court's evidentiary rulings against AMC/Jeep on the ground that such rulings are, in fact, "sanctions imposed by the trial court as a result of AMC/Jeep's failure to make discovery." (Resp. Br. at 11). Plaintiffs' arguments in this regard fail for three independent reasons. First, AMC/Jeep responded fully, or objected to, all of plaintiffs' discovery requests. Second, plaintiffs' discovery did not request from AMC/Jeep

information relating to the demonstrative evidence erroneously excluded by the trial court. Third, plaintiffs' never moved the trial court to sanction AMC/Jeep nor did the trial court ever indicate that it was sanctioning AMC/Jeep for any discovery abuse.

A. Plaintiffs' Brief Fails to Present the Complete History of the Pretrial Proceedings in this Case -- AMC/Jeep Responded to all of Plaintiffs' Discovery.

A comparison of AMC/Jeep's criticism of the trial court's evidentiary rulings to plaintiffs' defense of those rulings might lead the reader to wonder whether the parties are speaking about the same trial. AMC/Jeep's arguments regarding the trial court's exclusion of virtually all of AMC/Jeep's demonstrative evidence underscore the relevance of such evidence both as rebuttal evidence and to show state-of-the-art. (Pet. Br. at 52-56). Plaintiffs' arguments in defense of the trial court's exclusion of AMC/Jeep's evidence, on the other hand, center on references to certain pre-trial proceedings. (Resp. Br. at 5-19, 38-49). So the record is crystal clear on this point, the Court should be aware that the following portions of the record comprise all of the interrogatories, motions and hearings regarding pre-trial discovery in this case. As is detailed in full below, there is nothing in these pleadings and transcripts which supports plaintiffs' charge that the trial court's erroneous evidentiary rulings are supported by pre-trial activity in

this case: (1) Plaintiffs' first set of interrogatories - March 4, 1981 (R. 128); (2) Plaintiffs' motion to compel answers to interrogatories - July 6, 1981 (R. 134); (3) American Motors' answers to interrogatories - July 20, 1981 (R. 216); (4) American Motors opposition to plaintiffs' motion to compel - July 21, 1981 (R. 236); (5) plaintiffs' second set of interrogatories - September 15, 1981, (R. 246, 256); (6) plaintiffs' motion to compel, referring to first set of interrogatories already answered by American Motors - November 12, 1981 (R. 257); (7) plaintiffs' motion to compel, referring to second set of interrogatories - August 4, 1982 (R. 588); (8) AMC/Jeep's answers to second set of interrogatories - August 13, 1982 (R. 614); (9) plaintiffs' motion to strike or to compel - August 20, 1982 (R. 641); (10) AMC/Jeep's memorandum opposing motion to compel or strike - September 14, 1982; (11) hearing before Judge Sorenson (T., 10/29/82, at 1-49; R. 5006-5055); (12) hearing before Judge Sorenson (T., 12/29/82, at 1-16; R. 5056-5072); (13) AMC/Jeep's supplemental answers to interrogatories - January 25, 1983 (R. 755); (14) plaintiffs' motion in limine - October 7, 1983 (R. 1063); (15) minute entry regarding motion in limine - October 7, 1983 (R. 1365); (16) transcript of trial court's consideration of motion in limine, October 27, 1983 (T., 10/27/83, at 1555-1576; R. 3337-3358).

Plaintiffs' recount of the pre-trial proceedings in this case is as incomplete as it is misleading. For example,

plaintiffs fail to mention the pleadings numbered (2), (4), and (13) above. The complete chronological recapitulation of those proceedings that follows reveals an utter lack of foundation for any "sanction," let alone a purported "sanction" of the devastating magnitude that resulted from the trial court's erroneous evidentiary rulings.

Plaintiffs filed and served their first set of interrogatories to American Motors Corporation and Jeep Corporation on or about March 4, 1981. (R. 128). Plaintiffs moved to compel answers to this set of interrogatories on July 6, 1981. (R. 134). Plaintiffs' neglect to point out to this Court that American Motors provided timely answers and objections to this set of interrogatories on July 20, 1981. (R. 216-233). This response was complete, comprising more than 15 pages. Plaintiffs also fail to note that American Motors responded fully to their motion to compel on July 21, 1981. (R. 236).

Plaintiffs served their second set of interrogatories on American Motors Corporation and Jeep Corporation on September 15, 1981. (R. 246, 256). Plaintiffs next filed a Motion for Order Compelling Discovery on November 12, 1981. (R. 257). However, as the memorandum accompanying that motion makes clear, plaintiffs' motion is directed entirely to American Motors' answers to plaintiffs' first set of interrogatories. (R. 259-265). This first set of interrogatories had already been answered by American Motors.

Plaintiffs did nothing with respect to its discovery of AMC/Jeep's information for the next seven months. On August 4, 1982, however, plaintiffs filed a pleading styled "Third Motion for Order Compelling Discovery." (R. 588). Here, for the first (not the third) time, plaintiffs moved the trial court to compel answers to plaintiffs' second set of interrogatories served on September 15, 1981. AMC/Jeep responded by filing complete answers and objections to this set of interrogatories on August 13, 1982. (R. 614-636). Once again, AMC/Jeep's response was extensive, comprising some 21 pages. Included in this response was a list of 240 different drawings, blueprints and plans relating to the design and development of the Commando. (R. 632-635). These drawings, blueprints and plans were made available to plaintiffs and were completely responsive to plaintiffs' interrogatories.

Plaintiffs next tactic, on August 20, 1982, was to move to strike AMC/Jeep's answers to both sets of interrogatories or, in the alternative, to compel. (R. 641-642). AMC/Jeep filed a memorandum opposing plaintiff's motion on September 14, 1982. (R. 671-642). In that memorandum, AMC/Jeep explained that many of plaintiffs' interrogatories were not answerable by AMC/Jeep due to the fact that the Commando vehicle at issue in this lawsuit was designed prior to 1966 by a predecessor corporation and that many records were either difficult to locate or no longer in existence.

AMC/Jeep offered to allow plaintiffs' counsel to depose any of its personnel who might have relevant knowledge. That offer was never acted on by plaintiffs.

At this stage of the pre-trial proceedings, AMC/Jeep emerges as anything but the recalcitrant litigant portrayed in plaintiffs' brief. Rather, AMC/Jeep had responded to all pending discovery and had responded fully to plaintiffs' charges that those answers were inadequate.

B. Plaintiffs' Interrogatories did not Request Information Bearing on the Demonstrative Evidence Erroneously Excluded by the Trial Court.

Despite the fact that AMC/Jeep had responded fully to their interrogatories and motions, and despite the fact that AMC/Jeep had offered to permit plaintiffs to interrogate AMC/Jeep personnel to amplify such responses, plaintiffs brought their complaints about AMC/Jeep's responses before the trial court, Judge Sorenson presiding, on October 29, 1982. At that hearing, the trial court, in an effort "to cut the Gordian knot in this case right now," (T., 10/29/82, at 4; R. 5010), commenced reading the disputed interrogatories one by one. (Id., at 9-49; R. 5015-5055). Despite plaintiffs' dramatic assertions to the contrary, (see Resp. Br. at 5-19), the net effect of Judge Sorenson's exercise is extremely difficult to determine. As Judge Sorenson himself noted during the course of this hearing: "We are making a terrible record here, a dreadful record. I wouldn't want to

be arguing it right as of now before an appellate court." (Id., at 38; R. 5044).

Plaintiffs' contentions at the hearing centered on their alleged inability to obtain from AMC/Jeep certain information regarding the design and development of the 1972 Jeep Commando. Plaintiffs never requested information either with respect to Jeep CJ5 vehicles or with respect to films or tests of other vehicles or even with respect to films or tests prepared after 1972. Judge Sorenson comprehended fully the limited scope of plaintiffs' interrogatories and restricted his observations on many of the interrogatories as follows:

> I will have you give them all available information or reasonably retrievable information as regards the 1972 model [Commando] only. Now that is all I can do Mr. Howard.

(Id., at 12; R. 5018; see also Id., at 13-15; R. 5019-5021). Judge Sorenson's limitation of his comments to "the 1972 [Commando] model only" is critical. Judge Sorenson recognized, and plaintiffs' arguments to Judge Sorenson emphasized, that plaintiffs' interrogatories sought only information regarding the design and development of the 1972 Commando.

The AMC/Jeep evidence which would later be excluded by Judge Bullock was not responsive either to the letter of plaintiffs' interrogatories or to the spirit of those interrogatories as interpreted by Judge Sorenson. As amplified in

AMC/Jeep's Brief, Judge Bullock excluded the following evidence proffered by AMC/Jeep, none of which relates to the design and development of the 1972 Commando: (1) a 1983 film showing a 1979 model Jeep CJ5 undergoing emergency maneuvers and remaining upright (T., 10/27/83, at 1557, 1559, 1563-1566, 1570-1571; R. 3339, 3341, 3345-3348, 3352-3353); (2) a film showing six non-Jeep vehicles (a 1977 Datsun B-210 passenger car, a 1978 Toyota Corolla passenger car, a 1979 Chevrolet Chevette passenger car, a 1980 Toyota 4-wheel-drive pickup, a 1981 Ford Bronco utility vehicle, and a 1982 Datsun 4-wheel-drive pickup) with different centers of gravity than the Commando, showing that they all roll over under the same maneuvers depicted in plaintiffs' experts' films (Id., at 1571-1572; R. 3353-3354; T. 10/28/83, at 1745-1746; R. 3528-3529); (3) a film showing exemplar vehicles -- a Commando and an Oldsmobile similar to the automobile driven by defendant Larry Anderson which struck plaintiffs Commando from the rear -- undergoing certain tests intended to simulate plaintiffs' accident (T., 10/31/83, 1937-1938; R. 3724-3725); (4) a series of photographs depicting human beings in an exemplar vehicle in positions similar to those plaintiffs found themselves in during the course of their accident (id., at 1962-1967; R. 3749-3754); (5) a film demonstrating occupant movement and damage during rollover (id., at 1985; R. 3773); (6) an exhibit demonstrating the fact that the accident vehicle had been involved in a prior accident (id., at 2024-2026; R.

3812-3814); and (7) a film showing an exemplar vehicle, a Commando, undergoing certain tests and maneuvers with outriggers attached (id., at 1973; R. 3774). None of this evidence excluded by the trial court was responsive to plaintiffs' interrogatories, because none of this evidence related to the design and development of the 1972 Commando. In fact, much of it was relevant primarily as rebuttal evidence to issues raised by plaintiffs' presentation of their case-in-chief. Most certainly, plaintiffs have identified no interrogatory and no statement by Judge Sorenson which would have required AMC/Jeep to produce these films, charts and photographs to plaintiffs prior to trial.

C. Plaintiffs Never Moved for, nor did the Trial Court Impose, any Sanctions Against AMC/Jeep.

Judge Sorenson continued his recitation of plaintiffs' second set of interrogatories on December 29, 1982. At this point, plaintiffs' counsel asked Judge Sorenson for sanctions based on an asserted failure by AMC/Jeep to comply with plaintiffs' versions of what had occurred at the October 29 hearing. (T., 12/29/82, at 3-6; R. 5059-5062). Judge Sorenson stated: "All right, I will entertain your request for sanctions if you will follow the rules." (Id., at 6; R. 5062). Plaintiffs responded that they "will make an appropriate motion for sanctions." (Id., at 7; R. 5063). No such motion was ever filed by plaintiffs and no ruling concerning sanctions was ever made by the trial court in this

case. Judge Sorenson continued through plaintiffs' second set of interrogatories, commenting along the way on the opaqueness of plaintiffs' language:

> I am going to make an observation as an attorney, Mr. Johnson [plaintiffs' counsel], not as a Judge: The English language can be extremely treacherous, and some of these interrogatories -- this is merely my observation as a student of the language of the law -- are not well phrased in my opinion as a lawyer, not as a Judge.
> ....
> There is an absence of specificity in these interrogatories generally.

(Id., at 10, 12; R. 5066, 5068). In this respect, Judge Sorenson qualified many of his comments in the following fashion: "I will grant you permission to seek the information you seek by interrogatory number twenty seven after you have clarified precisely what it is you are asking." (Id., at 11; R. 5067; see also id., at 12; R. 5068). No such clarification was ever attempted by plaintiffs.

In short, the net result of Judge Sorenson's exercise, as outlined above, was to prod both parties into concluding discovery in this case in a reasonable manner. The trial court criticized the lack of clarity in plaintiffs' interrogatories and directed them to clarify the interrogatories before AMC/Jeep would be required to answer many of them. AMC/Jeep was directed to provide such answers as were available to those interrogatories that were capable of being understood. Most importantly, however, and as noted above

but totally ignored in plaintiffs' Brief, Judge Sorenson contemplated that a formal motion for sanctions would have to be filed by plaintiffs in the event plaintiffs wished to claim that AMC/Jeep thereafter failed to respond in good faith to the court's comments and suggestions. The court's minute entry in this regard is clear: "The court will entertain plaintiff's request for sanctions providing Mr. Johnson follows the rules of practice." (R. 729). Judge Sorenson could hardly have been more precise in stating that his comments and suggestions, standing alone, would not form the basis for sanctions; a motion for sanctions would be required. No such motion was ever filed by plaintiffs. It strains credulity, therefore, for plaintiffs to defend the trial court's challenged rulings on AMC/Jeep's evidence based on Judge Sorenson's comments.

Although plaintiffs never filed their promised motion for sanctions, AMC/Jeep did file "Supplemental Answers and Objections to Certain of Plaintiffs' Interrogatories" on January 25, 1983. (R. 755). These answers represent AMC/Jeep's response to Judge Sorenson's suggestions and comments. Plaintiffs fail to note in their Brief that AMC/Jeep in fact responded to Judge Sorenson's suggestions and comments in this manner. AMC/Jeep's supplemental answers were never objected to by plaintiffs and no motion to compel with respect to them was ever filed by plaintiffs.

D. The Trial Court did not Base its Exclusion of AMC/Jeep's Evidence on Rule 37 of the Utah Rules of Civil Procedure.

Plaintiffs' Motion in Limine, seeking to prevent AMC/Jeep from presenting certain evidence, was first considered by the trial court on the same day it was filed, October 7, 1983. The Motion contained no reference either to Rule 37 of the Utah Rules of Civil Procedure or to sanctions. The trial court's minute entry for this hearing reflects only the following:

> Mr. Howard made a motion for Jeep to be prevented from raising matters which they failed to respond to in their answers to interrogatories. Matter discussed at length between Court and counsel. The Court ruled defendant may cross examine, but is not to bring up new facts which were not given plaintiff's counsel in their response to interrogatories; however, if some facts are used and defendant's witness makes a different conclusion, those opinions would be admissible.

(R. 1365). This synopsis of the day's discussion contains no hint as to the sweeping evidentiary rulings to be made in the future by the trial court with respect to AMC/Jeep's cross-examination and evidence. It states only that AMC/Jeep was "not to bring up new facts which were not given plaintiffs' counsel in their response to interrogatories." It does not state that AMC/Jeep would be precluded from presenting evidence never requested in plaintiffs' interrogatories. Nor does it indicate that AMC/Jeep had failed to respond to plaintiffs' interrogatories. Moreover, the last clause

quoted above runs directly contrary to the trial court's blockage of AMC/Jeep's legitimate efforts to cross-examine plaintiffs' experts. (See App. Br. at 36-42). Most importantly, there is absolutely no indication that the trial court's statements were based in any way on Judge Sorenson's prior hearings, or that the trial court intended to "sanction" AMC/Jeep.

The trial judge's sole intimation of reliance on Judge Sorenson's pre-trial rulings is found in connection with plaintiffs' presentation of their Motion in Limine, in chambers, on October 27, 1983. (T., 10/27/83, at 1555-1576; R. 3337-3358). The trial judge heard plaintiffs' version of Judge Sorenson's hearings and excluded one of AMC/Jeep's films on the ground that "Plaintiffs were entitled to have, or to see, the films and test results before the trial pursuant to their discovery interrogatories." (Id., at 1571; R. 3353). A careful review of the record reveals clearly, however, that this film bore absolutely no relation to any of plaintiffs' interrogatories. It was a film made in 1983 of a Jeep CJ5 and had nothing to do with the 1972 Commando. In fact, the film was not even prepared by AMC/Jeep. (Id., at 1557-1558; R. 3339-3340). Plaintiffs' interrogatories never inquired either into testing of CJ5's or into testing that occurred in 1983. When counsel for AMC/Jeep protested that the trial judge had misapprehended Judge Sorenson's intent, the trial judge clarified his ruling, stating: "My ruling

was based not only on that, but on what I consider to be the Rules of Civil Procedure." (Id., at 1574; R. 3356). Thus, even in this single instance when the trial judge referred to Judge Sorenson's pre-trial hearings, it is not at all clear that the trial judge intended to rely on those hearings to support his exclusion of AMC/Jeep evidence. It is absolutely clear, however, that even if the trial judge intended to rely on such hearings, the film excluded by the trial judge on this occasion was not within the scope of any interrogatory propounded by plaintiffs to AMC/Jeep.

A review of the trial judge's evidentiary rulings throughout the trial reveals that such rulings were based on his view of the relevance of AMC/Jeep's evidence and cross-examination, not on the transcript of the hearings before Judge Sorenson. The trial judge never related his systematic exclusion of AMC/Jeep's demonstrative evidence to any interrogatory or interrogatories; in fact, such relation was impossible because plaintiffs' interrogatories did not relate to the AMC/Jeep evidence excluded by the trial judge. Moreover, as is amplified in the preceding pages of this Brief, if the trial judge intended to sanction AMC/Jeep by excluding evidence crucial to the defense of this lawsuit, plaintiffs should have, at the least, been required to file a Motion for Sanctions to which AMC/Jeep could have responded. Hercules Drayage Company, Inc. v. Canco Leasing Corp., 24 Ariz. App. 598, 540 P.2d 724, 726 (1975) ("Our interpretation of Rule 37

would require that the party wishing to avail itself of the sanctions for failure of discovery must move the court for an order sanctioning the alleged uncooperative party.")

POINT II

PLAINTIFFS' ATTEMPTED DEFENSE OF THE TRIAL COURT'S EVIDENTIARY RULINGS IS UNAVAILING

The bulk of plaintiffs' Brief is consumed with the effort to single out and defend individually several of the trial court's erroneous evidentiary rulings detailed in AMC/Jeep's Brief. (Resp. Br. at 19-38). Any one of the trial court's errors, standing alone, would justify reversal of the judgment on the verdict. Plaintiffs' attempt to focus, point by point, on a few selected rulings out of the many challenged by AMC/Jeep does not blunt the thrust of AMC/Jeep's argument that the cumulative effect of the trial court's evidentiary rulings -- its admission of plaintiffs' irrelevant and inflammatory evidence, combined with its blockage of AMC/Jeeps's efforts to cross-examine plaintiffs' experts, combined with its exclusion of substantial portions of AMC/Jeep's evidence -- requires that the trial court's judgment on the verdict be reversed. The flaws inherent in plaintiffs' particular points are set out below.

A. The Dynamic Science Film was Irrelevant and Unduly Prejudicial and Should Have Been Excluded

Plaintiffs discuss at length the admissibility of the so-called Dynamic Science film. (Resp. Br. at 19-27).

This discussion is in apparent response to Point I of AMC/Jeep's Brief wherein this film, along with two other films introduced by plaintiffs and one of plaintiffs' expert's charts, are shown to be irrelevant to the issues of this lawsuit. (App. Br. at 26-36). Plaintiffs' decision to defend only one of the several demonstrative films and exhibits challenged in AMC/Jeep's Brief is not explained in plaintiffs' Brief, but in any event AMC/Jeep's challenge to the receipt in evidence of the other two films is not disputed by plaintiffs.

Turning to the Dynamic Science film, it will be recalled that AMC/Jeep's objection to this film and virtually all of plaintiffs' demonstrative evidence and expert testimony centered on its lack of relevance to the only issues in plaintiffs' case against AMC/Jeep: (a) whether the plaintiffs' 1972 Commando was defectively designed and unreasonably dangerous when it left the hands of the manufacturer because it rolled over when struck from behind, on an interstate highway, by a vehicle traveling approximately 70 miles per hour, and (b) whether the alleged design defect was a proximate cause of plaintiffs' injuries. Rather than bearing on the above issues, the Dynamic Science film shifted the focus of this case away from plaintiffs' accident towards a rambling investigation of Jeep vehicles, not Commandos, in general. As plaintiffs' own witness candidly explained, the "defect" presented to the trial court and jury by plaintiffs

"may not have anything to do with this particular accident." (T., 10/25/83, at 934; R. 2714).

The Dynamic Science film defended in plaintiffs' Brief is perhaps the best example of the irrelevant and inflammatory nature of plaintiffs' evidence. The film's lack of relevance is detailed at pages 28-29 of AMC/Jeep's opening Brief. Suffice it to note here that the film showed Jeep CJ5's, not Commandos, and was explained by an expert who had never tested a Commando. More importantly, the maneuvers depicted in the film were never shown to bear any relationship to the circumstances of plaintiffs' accident. Similarly, the movement of the anthropomorphic dummies seated in the CJ5 was never shown to bear any resemblance to plaintiffs' movement during the course of their accident.

Plaintiffs' statement in their Brief that "Mr. Noettl testified that the CJ-5 on the film demonstrated handling reactions substantially similar to the manner in which the Jeep Commando would respond under circumstances and conditions prevalent in this accident," (Resp. Br. at 20), is a misstatement of the record. Mr. Noettl never offered such testimony. In fact, Mr. Noettl could make no such statement because he had never tested a Commando nor had he reconstructed plaintiffs' accident. (T., 10/26/83, at 1182; R. 2907). Mr. Noettl was utilized by plaintiffs primarily to testify that "Jeeps," as a generic class of vehicles, are easier to overturn than a "passenger car." Id. at 1262; R.

3039). Plainly, Mr. Noettl was incompetent to render the Dynamic Science film relevant to the issues in this case.

Plaintiffs also state that Mr. Noettl testified that "the tests that were appropriate for conditions basically similar to that giving rise to this litigation were the J Turn and the obstacle avoidance maneuver [depicted in the film]. (R. 2972)." (Resp. Br. at 21). A review of the record cited by plaintiffs for this statement reveals that Mr. Noettl is referring to the tests shown in the film but in no way relates those tests to plaintiffs' accident. Here, as throughout his testimony, Mr. Noettl assumes the role of one testifying to a legislative or administrative committee about the characteristics of off-road vehicles in general. His testimony, and the film he utilized to illustrate that testimony, are not relevant to the issues in this lawsuit. Contrary to the insistence of plaintiffs that Mr. Noettl "testified that the film was material, for it demonstrated the rollover threshold of the Jeep Commando under circumstances similar to that which occurred on the day and place of the accident," (Resp. Br. at 21-22), plaintiffs are unable to cite any place in the record where such a foundation was laid. In fact, plaintiffs' counsel went so far as to stipulate that the film did not simulate the conditions prevailing at the time of the accident. (T., 10/26/83, at 1207; R. 2984).

Plaintiffs respond inadequately to AMC/Jeep's argument that plaintiffs' experts' films should have been excluded because they lacked "a foundational showing ... that the tests were conducted under conditions substantially similar to actual conditions." Collins v. B.F. Goodrich Co., 558 F.2d 908, 910 (8th Cir. 1977). Plaintiffs' Brief simply ignores the established rule which places "the burden ... upon the party offering evidence of out-of-court experiments ... to lay a proper foundation demonstrating a similarity of circumstances and conditions." Barnes v. General Motors Corp., 547 F.2d 275, 277 (5th Cir. 1977). Plaintiffs' attempt to distinguish Haynes v. American Motors Corporation, 691 F.2d 1268 (8th Cir. 1982), is simply disingenuous. The trial court in Haynes ruled that a commercial film showing a Jeep CJ5 in off-road situations was irrelevant and inadmissible because neither the vehicle depicted nor the maneuvers illustrated in the film bore any relation to the plaintiffs' vehicle or circumstances. The case is directly on point and underscores the trial court's evidentiary errors below.

B. Plaintiffs Fail to Justify the Trial Court's Erroneous Limitation of AMC/Jeep's Cross-Examination of Plaintiffs' Experts

AMC/Jeep's opening Brief details, with full citation to the record, the trial court's blockage of AMC/Jeep's efforts to cross-examine plaintiffs' experts on their crucial opinion that "Jeeps," as a class of vehicles, overturned much

more readily than other vehicles and that non-Jeep vehicles would not have overturned under the circumstances of plaintiffs' accident. (App. Br. at 36-42). (See T., 10/25/83, at 1001-1005, 1018; R. 2780-2784, 2797; T., 10/26/83, at 1266, 1275; R. 3043, 3052).

Plaintiffs' respond to AMC/Jeep's argument by defending the trial court's "position in legal circles and his prominence among his colleagues, both before and after appointment to the bench ...." (Resp. Br. at 27-28). Counsel for AMC/Jeep certainly do not disagree with plaintiffs' assessment of the trial court's reputation, but it is facts and law, not gratuitous reference to the trial court's reputation and ability, which must govern the outcome of this appeal.

Plaintiffs intimate that their experts' comparison of "Jeeps" to other vehicles was not elicited on direct examination by plaintiffs' counsel and that the trial court's blockage of AMC/Jeep's cross-examination on this point was proper. (Resp. Br. at 32). Quite contrary to plaintiffs' suggestion, plaintiffs' experts rendered their opinion that "Jeeps" compared unfavorably to "other vehicles" under direct examination by plaintiffs' counsel. (T., 10/20/83, at 558-560; R. 2331-2333 [direct examination by Mr. Howard]; T., 10/25/83, at 896-897; R. 2676 [direct examination by Mr. Howard]).

Plaintiffs next attempt to confuse the issue by noting that AMC/Jeep was, indeed, allowed to voir dire and cross-examine their witnesses on several topics. (Resp. Br. at 28-35). What plaintiffs neglect to point out is that the pages of the record to which they cite involve voir dire and cross-examination on issues wholly unrelated to the critical opinion offered by these experts that a "Jeep" overturns in circumstances in which "some other car" would not have overturned.

The entire point of AMC/Jeep's argument in this regard, that plaintiffs' experts were permitted to compare "Jeeps" to other vehicles but that AMC/Jeep was blocked from cross-examining on this point, is utterly ignored in plaintiffs argument. Similarly, plaintiffs never address the documented charge of AMC/Jeep that "[t]he practical effect of the trial court's restriction of appellants' right of cross-examination was to allow plaintiffs' theory of the case to go unchallenged. Plaintiffs' experts were allowed to testify repeatedly and without foundation that 'Jeeps' performed poorly in comparison to other vehicles, yet AMC/Jeep was prohibited from exploring the basis for that comparison." (App. Br. at 39).

C. The Trial Court's Exclusion of Virtually All of Plaintiffs' Demonstrative Evidence is Plain Error

AMC/Jeep has detailed the trial court's exclusion of AMC/Jeep's evidence which would have demonstrated that the

tests depicted in plaintiffs' films bore no relation to emergency driving conditions and that "Jeeps" in general and Commandos in particular are reasonably stable vehicles which can successfully negotiate realistic emergency situations. (App. Br. at 42-56).

Plaintiffs respond to AMC/Jeeps contentions by shifting focus, once again, from the facts and the law. Plaintiffs' charge that AMC/Jeep has charged the trial court with "incompetence and corruption". (Resp. Br. at 39). Suffice it to say that such arguments are as unfounded as they are gratuitous.

Plaintiffs next rehash their argument concerning the pre-trial proceedings in this case. The full and undeniable fallaciousness of plaintiffs' argument in this regard is revealed by their statement that the subject of the film offered by AMC/Jeep's expert, Mr. Heitzman, had been "previously specifically barred" by Judge Sorenson. (Resp. Br. at 40). Judge Sorenson never did any such thing.

First, the film at issue would have been utilized by Mr. Heitzman to illustrate his opinion concerning the handling qualities of the CJ5. The film was plainly relevant because the CJ5 had been much maligned by plaintiffs' experts and plaintiffs had presented to the jury the notion that the CJ5 and plaintiffs' Commando were identical. Plaintiffs can point to no interrogatory reviewed by Judge Sorenson which requests any information concerning the CJ5. Second, as has

been previously made clear, Judge Sorenson stated explicitly to plaintiffs that a motion for sanctions would have to be filed before the trial court would consider imposing any sanctions. No such motion was ever filed, either before Judge Sorenson or before the trial judge. Once again, plaintiffs make no attempt to defend the actual basis for the trial judge's exclusion of AMC/Jeep's evidence; the erroneous belief that such evidence was irrelevant.

It must be noted that plaintiffs make no attempt whatsoever to defend the trial court's exclusion of Mr. Heitzman's film showing vehicles with "outriggers" attached undergoing certain maneuvers. (See App. Br. at 44-47). This film was essential to demonstrate not only that plaintiffs' film of a Commando equipped with outriggers was misleading, but also that many vehicles besides "Jeeps" will roll over under the conditions depicted in plaintiffs' films.

Plaintiffs next argue that AMC/Jeep is precluded from challenging the trial court's exclusion of AMC/Jeep's demonstrative evidence because "[m]atters not admitted in evidence before the trier of fact will not be considered on appeal before the Supreme Court." (Resp. Br. at 45, quoting Pilcher v. State Dept. of Social Services, 663 P.2d 450, 453 (Utah 1983)). Pilcher has nothing to do with AMC/Jeep's challenges to the trial court's evidentiary rulings in this case. The errors cited by AMC/Jeep were carefully preserved through proffers reflected in the record before this Court.

Plaintiffs next defend the trial court's exclusion of two films offered to demonstrate the testimony of AMC/Jeep's expert Dr. Warner. The first of these films would have demonstrated the weaknesses in plaintiffs' experts' opinion that "Jeeps" overturn more easily than other vehicles. The second film was of an exemplar Commando equipped with outriggers, showing that the Commando is a stable vehicle. (See App. Br. at 47-49). Plaintiffs attempt to defend the exclusion of these two manifestly relevant films with the blithe comment that they were "rejected for the same reasons applicable to the Heitzman film." (Resp. Br. at 45-46). Once again, plaintiffs raise the issue of Judge Sorenson's 1982 hearings, but no substance is provided by plaintiffs to support their argument.

As with plaintiffs' argument concerning the irrelevant evidence admitted by the trial court over AMC/Jeep's objections, plaintiffs fail to address all of AMC/Jeep's claims of error in the trial court's exclusion of AMC/Jeep's evidence. Besides the films referred to above, the trial court also excluded erroneously a series of photographs offered to demonstrate Dr. Warner's testimony. Plaintiffs do not attempt to defend this action.

Finally, plaintiffs simply ignore AMC/Jeep's arguments that AMC/Jeep's demonstrative evidence should have been

admitted to rebut plaintiffs' irrelevant evidence.[1] (App. Br. at 50-56). Although it can be surmised that plaintiffs disagree with the cases and authorities cited by AMC/Jeep, it is clear that plaintiffs have left AMC/Jeep and this Court no hint as to the basis for such disagreement.

POINT III

CLOSING ARGUMENTS MADE BY OPPOSING COUNSEL WERE IMPROPER AND CONSTITUTED GROUNDS FOR A MISTRIAL

AMC/Jeep has detailed the gross misstatements made to the jury by opposing counsel during closing arguments. (App. Br. at 56-59). Despite the fact that AMC/Jeep had offered demonstrative evidence to rebut the testimony of plaintiffs' experts, and such evidence was kept from the jury by the trial court, counsel for defendant Larry Anderson[2]

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[1] Plaintiffs make a two sentence attempt to distinguish one of the many cases cited by AMC/Jeep for its argument that its demonstrative evidence was relevant to rebut the opinions of plaintiffs' experts. Contrary to plaintiffs' assertion, the court in Walker v. Trico Manufacturing Co., Inc., 487 F. 2d 595 (7th Cir. 1973), cert. denied, 415 U.S. 978 (1974), did not decide the issue whether state-of-the-art evidence is relevant to the defense of a strict products liability action. Rather, as is clear on page 600 of the opinion, the court held that even if state-of-the-art evidence, standing alone, was not relevant in the defense of such actions, such evidence should be permitted to rebut the plaintiff's introduction of similar evidence.

[2] At page 20 of AMC/Jeep's Brief a statement made during closing argument is erroneously attributed to counsel for defendant Variable Annuity Life. The statement is correctly attributed to counsel for defendant Larry Anderson on page 57 of the Brief.

argued as follows:

> Why didn't Jeep, having all of the test data of the plaintiff's experts, knowing exactly what they had done, even to the height of the outriggers off the ground; why didn't they go out and test a Commando, put some outriggers on there and to do some testing of their own? Why didn't they come in here and tell you, "We have done the same kind of tests that the plaintiffs did, we have put the same number of degrees of steer in on a Commando, and that vehicle wouldn't turn over; why didn't they do that? I'll tell you why: They are afraid to do it. They didn't dare do it. Because they knew that Commando would turn over.

(T., 11/3/83, at 109; R. 4659). Similarly, counsel for plaintiffs argued to the jury that AMC/Jeep had "No positive proof. None at all," (id., at 32; R. 4582), that "They [AMC/Jeep] bring no evidence, none at all," (id., at 33; R. 4583), and that AMC/Jeep's experts failed to bring "an ounce of engineering data." (Id., at 35; R. 4585).

The rule stated in AMC/Jeep's opening Brief is that "a lawyer who has successfully urged the court to exclude evidence should not be allowed to point to the absence of that evidence to create an inference that it does not exist." State v. Dudley, 104 Idaho 849, 664 P.2d 277, 280 (Idaho App. 1983) (quoting the American Bar Association Standards, The Defense Function, Section 7.8(a) (1971)). The "mischief" identified in Dudley is precisely the mischief engaged in by opposing counsel during their closing arguments. As this

Court has recently stated: "The proper remedy for prejudicial attorney misconduct is to order a new trial." Nelson v. Trujillo, 657 P.2d 730, 734 (Utah 1982).

Plaintiffs argue that "AMC/Jeep is precluded from now claiming reversible error as a result of counsel's closing argument by way of its failure to timely object to the alleged prejudicial statements." (Resp. Br. at 51). Plaintiffs fail to note the undeniable fact that AMC/Jeep strenuously objected to these statements and even moved for a mistrial because of them. (T., 11/3/83, at 193-197). It is of no moment that the objection was not made at the time the statements were made to the jury. As the court stated in Johnson v. Emerson, 103 Idaho 350, 647 P.2d 806, 810-811 (Idaho App. 1982):

> We do not interpret [the rule requiring timely objections] to require counsel to raise all objections instantly, during closing argument itself. Frequent objections during argument, even if proper, risk alienating the court and may serve only to emphasize objectionable comment for the jury.... Rather, we hold that if counsel elects to raise the alleged improprieties by a motion for mistrial or by other appropriate means, before the case is submitted to the jury, the issue will be preserved for appeal.

AMC/Jeep objected to, and moved for a mistrial based on, the quoted comments as soon as closing arguments were concluded and the jury had left the courtroom. The objection was certainly timely and served to preserve the issue for this appeal.

POINT IV

THE TRIAL COURT ERRED IN EXCLUDING EVIDENCE OF PLAINTIFFS' FAILURE TO UTILIZE AVAILABLE SEAT BELTS

A. Three Members of this Court have Expressed a View Consistent with the Rule that a Plaintiff's Failure to Utilize Available Seat Belts Constitutes a Failure to Mitigate Damages

AMC/Jeep has presented the substantive arguments of the growing number of courts which allow juries to consider a plaintiff's failure to utilize seat belts in connection with the issue of contributory fault and the plaintiff's duty to mitigate his own damages. AMC/Jeep also contends that the jury should have been permitted to consider the fact that plaintiffs' Commando was equipped with seat belts when deciding whether that Commando was defectively designed. (App. Br. at 59-68).

Plaintiffs' response to AMC/Jeep's presentation of the so-called "seat belt defense" issue is flawed from the outset. At the very beginning of their argument, plaintiffs misstate that "[t]here exists no controlling or even helpful case law within this jurisdiction regarding the issue of admissibility of evidence related to the use of seat belts." (Resp. Br. at 53). Plaintiffs fail to note the concurring opinion of Justice Oaks (joined by Chief Justice Hall and Justice Durham) in Acculog, Inc. v. Peterson, No. 18133; (Slip Opinion--May 1, 1984) (petition for rehearing filed).

The plaintiff in Acculog brought suit to recover damages suffered when his van was destroyed by fire. One of the issues at trial was whether the plaintiff's failure to carry a fire extinguisher in his van was relevant to either the issue of contributory negligence or the issue of mitigation of damages. The trial court avoided this issue on the ground that the parties had stipulated to the amount of damages. At the conclusion of trial, the jury returned a special verdict but the trial court ruled that plaintiff had no cause of action. The plaintiff appealed and this court remanded for a new trial. In connection with the remand, Justice Oaks authored a concurring opinion in which he offered "guidance" to the trial court on remand with respect to the issue of mitigation of damages. With the following statement, Justice Oaks embraced the arguments utilized by the courts that have adopted the "mitigation of damages" approach to the seat belt defense (see Pet. Br. at 61-66):

> [T]he amount of damages the plaintiff would be allowed to recover [after taking into account comparative negligence] is subjected to a further reduction dictated by the common-law rule of mitigation of damages or what the Restatement calls "the damages rule as to avoidable consequences ...." Restatement (Second) of Torts, Section 465 comment c (1965). This reduction, on which the defendant has the burden of proof, applies where the plaintiff is found to have been negligent in failing to mitigate or avoid damages and where this negligence is found to have increased his total damages beyond what he would have suffered if he had not been negligent in this manner.

Slip. Op. at 7 (emphasis added).

Justice Oaks clearly advocates the admissibility of evidence regarding non-use of available safety devices in his quotation of the following "well-reasoned" example propounded by the court in Halvorson v. Voeller, 336 N.W. 2d 118, 121-122 n.2 (N.D. 1983):

> Assume: X driving a car, and Y driving a motorcycle, get in an accident. Y is not wearing a helmet. The jury finds X is 60 percent liable for causing the accident [the "injury" under Section 78-27-37], making Y, the motorcyclist, 40 percent liable for causing the accident. The jury also finds Y would have avoided 60 percent of his injuries [damages] if he had worn a helmet; X is 40 percent liable for causing Y's [damages]. Y proves $100,000 in damages.
>
> On the basis of these findings, the $100,000 award would be reduced by 40 percent, which account for Y's contributing to the cause of the accident. Hence, the award is diminished to $60,000.
>
> The $60,000 should now be reduced to the extent that Y's [damages] would have been [avoided] had he worn a helmet, i.e., 60 percent. This adjustment leaves a total award of $24,000.

Id., at 8 n.1.

The issue before this Court does not involve any argument that plaintiffs caused their accident by failing to use their seat belts. Rather, AMC/Jeep's argument to this Court is found in the third paragraph quoted above; plaintiffs' damages should be reduced by the amount that their damages would have been "avoided" had they worn their seat

belts. Surely, if three members of this Court would consider non-use of a motorcycle helmet relevant to such an inquiry, evidence of non-use of the universally available seat belt is also relevant.

This is precisely the view espoused by many courts that have permitted juries in product liability cases involving automobiles to consider a plaintiff's failure to utilize available seat belts in determining the plaintiff's damages. See Insurance Company of North America v. Pasakarnis, 451 So. 2d 447, 454 (Fla. 1984); Spier v. Barker, 35 N.Y. 2d 444, 323 N.E. 2d 164, 167 (1974). These cases, and Justice Oaks' opinion, are consistent with Prosser's indication that the plaintiff's duty to mitigate his damages is equivalent to the doctrine of avoidable consequence, which precludes recovery for any damages which could have been eliminated by reasonable conduct on the part of the plaintiff. W. Prosser, Handbook of the Law of Torts Section 65, pp. 442-444 (4th Ed. 1971).

Although this concept has been applied most often to post-accident conduct, courts recognize that this does not preclude its application to pre-accident conduct. Plaintiffs' claim that "the duty to mitigate damages cannot arise before the plaintiff is damaged," (Resp. Br. at 62-66), exalts theory over common sense and sound policy. Evidence of a plaintiff's failure to utilize an available seat belt should be admitted because seat belts afford the automobile

occupant an unusually effective means by which a person "may minimize his or her injuries prior to an accident." Spier v. Barker, 323 N.E. 2d, at 168. The simple fact is that in many cases, as in this one, it can be demonstrated that the failure of a plaintiff to use an available seat belt exacerbated the plaintiff's injuries. See Werber, A Multi-Disciplinary Approach to Seat Belt Issues, 29 Cleve. St. L. Rev. 217, 231-235 (1980).

B. Plaintiffs' Knowledge, or Lack of Knowledge, With Respect to the Presence of Seat Belts in their Vehicle does not Bear on AMC/Jeep's Defense Based on Plaintiffs' Failure to Use their Seat Belts.

Plaintiffs point out that AMC/Jeep was barred by the trial court from introducing evidence of plaintiffs' failure to use their seat belts because there was no showing that plaintiffs knew of the seat belts or that they made a conscious decision not to use them. (Resp. Br. at 54-56). The trial court's position, as well as plaintiffs' argument in this regard is not supported by either law or common sense. Even assuming that the location of the seat belts is relevant to plaintiffs' culpability in failing to use them, such facts only present a question for the jury to decide, not a basis for excluding from the jury's consideration the failure to use the belts.

In any event, plaintiffs' awareness of the seat belts does not bear directly on the issue at hand. There is

no dispute that plaintiffs' Commando was equipped with seat belts. It can hardly be the fault of AMC/Jeep that those seat belts "were under the seat" as alleged by plaintiffs. (Resp. Br. at page 56). Also, whether or not plaintiffs made a "conscious decision" to eschew the use of their seat belts is not at issue here. Whether conscious or simply unwise, AMC/Jeep contends, and the evidence would have shown, that plaintiffs' failure to use their seat belts contributed to their injuries. The amount that plaintiffs' damages should have been reduced by reason of that failure is an issue for the jury to decide. The trial court erred in preempting this issue of fact.

C. The Absence of a Statutory Obligation does not Preclude the Imposition of a Common Law Duty to Utilize Available Seat Belts.

Plaintiffs next argue that "there exists no statutory nor common law duty to utilize a seat belt." (Resp. Br. at 57-60). AMC/Jeep has never contended that there is a Utah or federal statute requiring one to utilize an available seat belt. But plaintiffs' leap from that fact to the assertion that no duty exists at common law to utilize a seat belt is unsupported and unfounded. The absence of statutory obligations to use reasonable care and to mitigate damages has been no bar to the common law development of those doctrines. For example, the fact that there is no statutory obligation to wear a crash helmet when operating a motorcycle did not deter

Justice Oaks from stating that failure to wear a crash helmet would be relevant to the issue of mitigation or avoidance of damages. Acculog, supra, at 8 n.1.

Plaintiffs argue that it is for the legislature, not the courts, to decide whether to "penalize a plaintiff for not using seat belts ...." (Resp. Br. at 59, quoting Kopischke v. First Continental Corp., 610 P.2d 668 (Mont. 1980); see also id., at 60-62). The Florida Supreme Court, in ruling that a jury should be allowed to consider evidence of a plaintiff's failure to use available seat belts, responded to this call for judicial restraint most convincingly:

> [The plaintiff] asserts that the single most compelling reason for such a holding [i.e., that the jury cannot consider the plaintiff's failure to use seat belts] is the principle that courts are law interpreting and not lawmaking and argues that we should not act in a peculiarly legislative manner.
>
> We disagree and find this issue particularly appropriate for judicial decision. In the past, this Court has not abdicated its continuing responsibility to the citizens of this state to ensure that the law remains both fair and realistic as society and technology change. ...
>
> To abstain from acting responsibly in the present case on the basis of legislative deference would be to consciously ignore a limited area where decisions by the lower courts of this state have created an illogical exception to the doctrine of comparative negligence ... and the underlying philosophy of individual responsibility ....

Insurance Company of North America v. Pasakarnis, supra, 451 So. 2d, at 451.

Product liability law creates incentives for manufacturers to design and make safe products and thus promotes the goals of tort law by limiting the risk of harm. But loss prevention and risk avoidance is not solely in the hands of manufacturers. Safety is a two-way street. Despite plaintiffs' charge that "the seat belt defense is inappropriate in the context of strict liability," (Resp. Br. at 69-70), the party in the best position to promote safety may be someone other than the manufacturer, such as the product user.

In this case, the jury should have been permitted to consider whether and to what extent plaintiffs' failure to utilize available seat belts contributed to their damages. This is consistent with the Restatement's position that every person--product user, manufacturer, and retailer--has a duty to act reasonably by exercising "those qualities of attention, knowledge, intelligence, and judgment which society requires of its members for the protection of their own interests and the interests of others." Restatement (Second) of Torts Section 283 comment b (1965) (emphasis added). This is the basis for tort rules relating to contributory fault, misuse, assumption of the risk, last clear chance, avoidable consequences, comparative causation, and mitigation of damages, all of which hold the plaintiff responsible for the consequences of failing to exercise reasonable care for his

own safety. These rules apply with equal force to product liability actions where "the user frequently can control the risk by avoiding foolish uses or by making use of some specific knowledge about significant alternatives that are in his or her control." Werber, supra, 29 Cleve. St. L. Rev, at 225. See Mulherin v. Ingersoll-Rand Co., 628 P.2d 1301, 1303 (Utah 1981), holding that it is proper for the jury to consider the faults of both plaintiff and defendant when they "have united as concurrent proximate causes of an injury" in strict product liability cases.

D. Plaintiffs Fail to Respond to AMC/Jeep's Argument that the Jury Should have been Permitted to Consider the Fact that the Commando was Equipped with Seat Belts in Connection with the Issue of Design Safety.

As AMC/Jeep argued in its opening Brief, the presence of seat belts in the accident vehicle is also relevant, in a design defect case such as this, on the question whether the vehicle is inherently unsafe and unreasonably dangerous because the safety of a vehicle's design cannot be fairly evaluated if the fact finder is precluded from considering the principal safety features designed into the vehicle for the express purpose of providing protection to the occupants.

This Court has recognized that "[s]trict liability in tort is not the equivalent of making the manufacturer or seller absolutely liable as an insurer of the product and its use." Mulherin v. Ingersoll-Rand Co., 628 P.2d 1301, 1302

(Utah 1981). Tort law does not require automobile manufacturers to make "accident proof" vehicles. Larsen v. General Motors Corp., 391 F.2d 495, 499 (8th Cir. 1968). Such a vehicle is impossible to make because accidents and collisions are inevitable. Thus, a manufacturer's duty is only to produce vehicles that are not unreasonably dangerous. See Ernest W. Hahn, Inc. v. Armco Steel Co., 601 P.2d 152 (Utah 1979) (adopting the language of Section 402A, Restatement (Second) of Torts, requiring the plaintiff in a strict product liability action to prove that the product at issue was in a defective condition and unreasonably dangerous to the ultimate consumer).

Whether the manufacturer's duty has been met in a particular case cannot be determined in a vacuum simply by focusing on the allegedly defective aspect of the design. Manufacturers make design decisions with the whole vehicle in mind, balancing a wide range of considerations. The jury in a design defect case like this one must be given the same opportunity to consider the vehicle as a whole. Wilson v. Volkswagen of America, Inc., 445 F. Supp. 1368, 1371 (E.D. Va. 1978); Daly v. General Motors Corp., 20 Cal. 3d 725, 144 Cal. Rptr. 380, 575 P.2d 1162, 1174-1175 (1978).

In evaluating whether a vehicle's design taken as a whole is reasonably safe, many factors are relevant. See Wade, On Product "Design Defects" and Their Actionability, 33 Vand. L. Rev. 551 (1980). The size and style of the vehicle,

its price, and its intended uses are all pertinent. A person who purchases a convertible car cannot expect the kind of protection that he would have in a hard top and the courts do not impose a duty on the manufacturer to design a convertible car which meets the same safety standards. Dreisonstok v. Wolkswagenwerk A.G., 489 F.2d 1066, 1072-1075 (4th Cir. 1974); Curtis v. General Motors Corp., 649 F.2d 808, 811-812 (10th Cir. 1981).

Consideration must also be given to the safety features inherent in the design of the vehicle in question. E.g., Wilson, supra, 445 F. Supp., at 1371; Daly, supra, 575 P.2d, at 1174. Cases alleging harm caused by a defect in design, regardless of the aspect of the product impugned, always raise questions about whether, through safety features designed into the vehicle, the manufacturer met its duty to design a vehicle that provides reasonable protection against foreseeable risks of harm.

Seat belts are placed in vehicles for the express purpose of reducing the risk of injury to vehicle occupants. This was as true of the seat belts in plaintiffs' Commando as it is in the case of all modern vehicles. It is neither feasible nor fair to determine whether a vehicle is unreasonably dangerous without considering the presence of seat belts, the specific purpose and effect of which are to meet the manufacturer's duty to reduce unreasonable risks of

injury. See Werber, supra, 29 Cleve. St. L. Rev., at 253-254.

The jury's consideration of the whole vehicle in a design defect case like this one is particularly appropriate in Utah. In Ernest W. Hahn, Inc. v. Armco Steel Co., 601 P.2d 152 (Utah 1979), this Court adopted the standard of Section 402A of the Restatement (Second) of Torts. Section 402A provides, in pertinent part, that "[o]ne who sells any product in a defective condition unreasonably dangerous to the user of consumer ... is subject to liability for physical harm thereby caused to the ultimate user ...." (Emphasis added). Many courts and commentators have noted that in design defect, as opposed to manufacturing defect, cases the "unreasonably dangerous" language of Section 402A assumes particular relevance:

> [O]ur experience teaches us that, in the conscious design choice cases, where there is no other (available) standard, excision of the unreasonably dangerous concept denudes Section 402A of its only vehicle for infusing into the notion of "defect" a meaningful guide to its determination. Dean Wade has written that in (conscious) design defect cases, the concept of defective condition standing alone is inappropriate, and that it has no independent meaning and is apt to prove misleading. Wade, Strict Tort Liability of Manufacturers, 19 Sw. L.J. 15 (1965). Accord, Ross v. Up-Right, INc., 402 F.2d 943 (5th Cir. 1968). We agree. Professor Keeton believes that, in the area of design problem "defective" means unreasonably dangerous. Keeton, Product Liability and the Meaning of Defect, 5 St. Mary's L.J. 30, 32 (1973).

Bowman v. General Motors Corp., 427 F. Supp. 234, 242 (E.D. Pa. 1977) (applying Pennsylvania law).

Thus, in deciding whether plaintiffs' Commando was defectively designed, as asserted by plaintiffs, the jury was required to decide whether the Commando was unreasonably dangerous. As the court stated in an analogous case, evidence that an accident vehicle had been equipped with seat belts should be admitted for the purpose of determining whether the vehicle was defectively designed because the jury must determine "whether the auto as a whole was defective and unreasonably dangerous ...." Wilson v. Volkswagen of America, Inc., 445 F. Supp. 1368, 1371 (E.D. Va. 1978). It is simply impossible to consider individual design decisions in a vacuum because such decisions are made as part of a myriad of design decisions that go into the manufacture of the whole vehicle.

Plaintiffs would have it that their presentation of but one aspect of the Commando, the strength of its roof when subjected to a roll over, is enough to show that the Commando was defective. This precise argument was rejected by the California Supreme Court in Daly v. General Motors Corp., 144 Cal. Rptr. 380, 575 P.2d 1162 (1978). The plaintiffs in that case sued the defendant manufacturer for damages suffered as the result of an automobile accident. The plaintiffs' theory against the manufacturer was that a door latch had been improperly designed. At trial, and over the plaintiffs'

objections, the defendant was permitted to introduce evidence that the accident vehicle was equipped with a seat belt-shoulder harness system, and a door lock, either of which if used would have prevented the injury complained of. The plaintiffs' lost at trial and, on appeal, challenged a jury instruction which directed that "'[i]n determining whether or not the vehicle was defective you should consider all of the equipment on the vehicle including any features intended for the safety of the driver.'" 575 P.2d, at 1174. It was the plaintiffs' contention, as plaintiffs contend here, "that only the precise malfunctioning component itself, and alone, may be considered in determining whether injury was caused by a defectively designed product." Id. The California Supreme Court disagreed with the plaintiffs' contention, stating as follows:

> The jury could properly determine whether the [accident vehicle's] overall design, including safety features provided in the vehicle, made it 'crashworthy,' thus rendering the vehicle nondefective. Product designs do not evolve in a vacuum, but must reflect the realities of the market place, kitchen, highway, and shop. Similarly, a product's components are not developed in isolation, but as part of an integrated and interrelated whole. Recognizing that finished products must incorporate and balance safety, utility, competitive merit, and practicality under a multitude of intended and foreseeable uses, courts have struggled to evolve realistic tests for defective design which give weight to this necessary balancing. ... However phrased, these decisions emphasize the need to consider the product as an integrated whole.

Id., at 1175. See also McElroy v. Allstate Insurance Co., 420 So. 2d 214 (La. App. 1982).

In this case, the Commando's roof, or even its roll over characteristics, are no more important a part of the vehicle than are its steering column, interior padding, door locks, suspension and seat belts. The trial court's exclusion of any evidence relating to seat belts is no more logical than the exclusion of any other safety device that AMC/Jeep had designed into the Commando. In fact, the trial court's exclusion of AMC/Jeep's seat belt evidence is particularly incongruous because that evidence would have shown that, if utilized, the seat belts would have prevented precisely the type of injury complained of by plaintiff Steven Whitehead. (T., 10/31/83, at 2018; R. 3806). In effect, the trial court barred the jury from considering the most critical safety feature designed into the Commando by AMC/Jeep.

This Court should hold that evidence of the presence of seat belts should be admitted on the issue of design defect in this case. Admitting this evidence is a simple matter of fairness. It will merely allow the jury to consider evidence regarding the capacity of seat belts to prevent and reduce injuries, along with all other relevant evidence, in determining whether the vehicle, taken as a whole, is defective and unreasonably dangerous as plaintiffs allege.

E. The Trier of Fact is Capable of Understanding and Applying Rationally the "Seat Belt Defense"

Plaintiffs assert that evidence with respect to seat belts and their relationship to a plaintiff's injury "is simply too speculative to be placed in issue before a jury." (Resp. Br. at 67-68). A jury's task in deciding whether, and to what extent, a plaintiff's failure to utilize available seat belt contributed to his injury, however, is hardly more difficult than comparative causation principles applied regularly by Utah juries under Utah's comparative negligence statute. As this Court said recently, in holding that these comparative principles are applicable in strict liability actions, "we believe that judges and juries will have little difficulty assigning the relative responsibility each is to bear for a particular injury when the ultimate issues in such comparisons are relative fault and relative causation." Mulherin, supra, 628 P.2d, at 1304. A jury is capable of weighing seat belt evidence in any tort action, and this case should be remanded for a new trial so that a jury can consider the evidence proffered by AMC/Jeep.

POINT V

THE TRIAL COURT ERRED IN REFUSING TO DIRECT A VERDICT BASED ON AMC/JEEP'S STATUTE OF LIMITATIONS DEFENSE

AMC/Jeep has detailed the trial court's erroneous decision to ignore AMC/Jeep's defense based on the statute of limitations found in Utah's Product Liability Act, Section

78-15-3, Utah Code Annotated. (App. Br. at 68-74). As plaintiffs admit, the statute of limitations defense was already before the trial court in the answer of defendant American Motors Sales Corporation. (R. 84-87). That answer was filed without objection. At the same time American Motors Sales Corporation filed its answer, defendant Jeep Corporation filed a motion for leave to amend its answer, filed previously, to bring it into accord with the answer of American Motors Sales Corporation. (R. 983-989).

Conceding that AMC/Jeep would have a valid defense based on the statute's six year limitations provision, (see Resp. Br. at 73), plaintiffs respond to AMC/Jeep's claim of error by arguing that the trial court was justified in denying Jeep Corporation's motion to amend its answer on the grounds that the amended answer would have delayed trial and would have required "extensive discovery on behalf of the plaintiff." (Resp. Br. at 77). Plaintiffs rely on Staker v. Huntington Cleveland Irrigation Co., 664 P.2d 1188 (Utah 1983), for their argument that such amendments to pleadings are rarely permitted at the commencement of or during trial. Totally ignored by plaintiffs, however, is the glaring fact which distinguishes this case from Staker and renders plaintiffs' arguments inapposite: The statute of limitations issue was already properly before the trial court in the answer of American Motors Sales Corporation. The prejudice

that plaintiffs claim would have resulted had Jeep Corporation's motion to amend been granted simply disappears in light of the fact that plaintiffs had to contend with AMC/Jeep's defense based on the statute of limitations in any event. Under these unique circumstances, Rule 15(a), Utah Rules of Civil Procedure, should have guided the trial court and leave to amend should have been granted in the interests of justice.

Plaintiffs also argue that AMC/Jeep "made absolutely no proffer of proof related to the Product Liability Act or statute of limitations during the entire course of trial; therefore, the issue is waived." (Resp. Br. at 74). The facts critical to this defense were undisputed, however, and the trial court did not rely on any such argument in denying AMC/Jeep's motion for directed verdict based on the statute of limitations. The motion was denied by the trial court without comment. (T., 11/4/83, at 18-19; R. 4774-4775). The trial court's failure to direct a verdict on this ground was erroneous and the trial court's judgment should therefore be reversed.

CONCLUSION

The trial court's judgment on the verdict cannot be sustained and must be reversed and a new trial or the entry of judgment for AMC/Jeep ordered for the six independently sufficient reasons detailed in AMC/Jeep's Brief. Plaintiffs' Brief fails to address many of the significant issues raised

by AMC/Jeep. The arguments to which plaintiffs have responded are not explained away or even blunted by plaintiffs' Brief.

For all of the foregoing reasons, and for the reasons stated in AMC/Jeep's Brief, the judgment on the verdict must be reversed and a new trial or the entry of judgment for AMC/Jeep ordered.

DATED this 2nd day of October, 1984.

ROOKER, LARSEN, KIMBALL & PARR

By 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two copies of the foregoing REPLY BRIEF OF APPELLANTS AMERICAN MOTORS SALES CORPORATION AND JEEP CORPORATION were served this 2nd day of October, 1984, by mailing said copies, first class postage prepaid, addressed to each of the following:

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